Supreme Court, U.S.
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No. 03-0393

In the

Supreme Court of the United States

PUBLIC SERVICE MUTUAL INSURANCE COMPANY,

Petitioner,

v.

ELLEN M. PECK,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF

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I. THE SECOND CIRCUIT'S OPINION VIOLATED *CELOTEX v. CATRETT*.

This case deals with the continued viability of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), which held that, in federal summary judgment matters, the party with the burden of proof at trial on a particular issue has the burden of presenting substantial evidence on that issue. Without such evidence, Rule 56 "mandates" the entry of summary judgment. 477 U.S. at 322.

This insurance coverage case involves late notice to the insurer. In late-notice cases, Connecticut law puts the burden on the plaintiff to show that the insurer was not prejudiced by the delinquency. *Aetna Cas. & Surety Co. v. Murphy*, 206 Conn. 409, 419, 538 A.2d 219 (1988) ("The burden of showing lack of prejudice must be borne by the insured.").

Because the plaintiff produced no evidence to show lack of prejudice, Rule 56 requires the entry of summary judgment against her.

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex Corp. v. Catrett, 477 U.S. at 322. Thus, the defendant was entitled to summary judgment.

In the case below, The Second Circuit did not, and could not, find that the plaintiff introduced evidence of lack of prejudice. The plain fact is that the plaintiff submitted no evidence on this critical issue. Accordingly, *Celotex* required summary judgment for the defendant.

Instead of finding a substantial conflict in the evidence regarding the material issue of lack of prejudice, the Second Circuit found a conflict in the evidence on an immaterial issue – whether the insurer received notice in September 1995 (which was some 15 months too late) or September 1998 (even later, by three years). Under either theory, notice was too late. Since notice was late, the burden was on the plaintiff to introduce evidence that the tardiness in the notice resulted in no prejudice to the insurance company. In failing to impose this burden on the plaintiff, the Court of Appeals violated this Court's ruling in *Celotex*.

Opposing certiorari, the plaintiff continues to use speculation, not evidence, in her effort to defeat summary judgment. Even though Rule 56(e) requires sworn testimony based on admissible facts, the plaintiff has submitted nothing to show that the insurance company was not prejudiced. Instead she simply repeats her continuing mantra that she is "certain" if she gets to trial, she will be able to show that even if the insurer had received prompt notice, it would not have acted differently. See Opposition Brief, at 10 ("Even if PSM had received notice of the suit the very date it was filed, we can be certain that the insurer would not have acted any differently.") Since the plaintiff introduced no evidence to show that the insurer was not prejudiced, the courts below were

obligated to summarily dismiss her claim.

The plaintiff asserts that there was evidence in the record to show that PSM was not prejudiced by the late notice. Opposition Brief, at 12. Yet the so called proof she alludes to — "documentation from the claims file, deposition testimony from PSM's claims supervisor, and an affidavit from defense counsel Gildea" — is immaterial to whether the defendant was prejudiced by the delinquency. To the extent that these items are relevant at all, these items relate to question of whether PSM received notice, albeit late. These items do not relate to the whether the insurance company was prejudiced by the tardiness of the notice.[1]

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[1] Even though the plaintiff now contends that she introduced evidence that the insurance company was not prejudiced by the tardiness of the notice, she does not — and cannot — point to any evidence to that effect. To the contrary, the record shows that the plaintiff opposed summary judgment, without producing evidence to show a triable issue of fact. Instead she simply argued that, since the issue of whether the insurance company was prejudiced was a factual issue, she would be "permitted to offer evidence" at trial. App., at 65a.

Actually, the record shows that the delay did prejudice the defense of the case. Because of the delay in notice, the insured selected Paul L. McCullogh, its own counsel, as its defense attorney. (Such a election violated the terms of the insurance policy.) Attorney McCullough then undertook a series of actions that clearly prejudiced the defense of the lawsuit: He filed pleadings for the insured that failed to include relevant defense issues. Instead of trying to negotiate a settlement, he waived an offer of judgment to the insured. He refused to answer discovery, resulting in a default against his client. Instead of trying to open the default, he misled the trial judge about the status of insurance in the case as well as the status of the insured's bankruptcy proceeding. He refused to obey the trial court's direct order to notify the insurance company about the coming trial. He refused to

Because there was no evidence on an issue on which the plaintiff had the burden of proof, the Second Circuit was obligated to sustain the summary judgment.

Because *Celotex v. Catrett* requires entry of summary judgment for the defendant, the Court of Appeals' order, reversing the judgment, should be vacated and the case should be remanded for judgment consistent with Rule 56.

II. THE USE OF ERRATA TO MAKE SUBSTANTIVE CHANGES IN THE JUDGMENT WAS AN ABUSE OF DISCRETION.

The problem with the original opinion below (App. 24a-41a) is obvious: It attempted to decide the appeal without referring to or citing the decisive case, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). It totally missed the *Celotex* issue, the decisive issue in the case.

After the slip opinion's omission of the *Celotex* issue, the defendant pointed out the error of this omission in its Petition for Rehearing. The panel attempted to gloss over its blunder by issuing the

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attend the trial, telling the trial judge that he "took no position" as to his client's liability. In fact, he took a very strong position as to his client's liability, testifying against his client as a witness for the plaintiff.

As the district court noted, "Attorney McCullough's representation was, if not a sham, an absolute disaster." App. 55a.

With this record can it possibly be argued that the late notice did not prejudice the insurance company?

Errata Sheet, purporting to correct the omission with "errata," i.e., a list of clerical errors in the panel's slip opinion.

A. Even After The Errata Sheet's "Correction" the Insurance Company Was Still Entitled to Summary Judgment.

The most serious problem with the Errata Sheet is that it does not resolve the *Celotex* error. As noted above, the insurer was entitled to summary judgment because (1) notice to the insurer was late; and (2) because this notice was late, Connecticut law imposes an obligation on the plaintiff to show that the late notice did not prejudice the insurer.

The Errata Sheet did not alter this syllogism. Even with the "correction," notice to the insurance company was still received some 15 months after suit was initiated.[2] Notice was, under either theory, late. Thus, the burden was on the insured, i.e., on the plaintiff, and not on the insurer, to show lack of prejudice. As noted above, the plaintiff submitted no evidence that the insurance company was not prejudiced by the late notice.

Since failure to introduce such evidence mandates summary judgment against the plaintiff, it is immaterial whether the notice was four years late (as

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[2] The Connecticut Supreme Court has held that notice only four months late is a breach of the insurance contract. *City of West Haven v. United States Fidelity & Guar. Co.*, 174 Conn. 392, 397, 389 A.2d 741 (1978). Thus, with or without the "correction" of the Errata Sheet, notice to the insurance company was still late.

the district court held), or some fifteen months late "as held by the Errata Sheet". The point is that the plaintiff did not show that the tardiness did not prejudice the insurance company.[3] Accordingly, even with changes set forth in the Errata Sheet, the defendant was entitled to summary judgment.

B. Using an Errata Sheet to Substantially Alter the Judgment is An Abuse of Discretion.

By characterizing the changes in the opinion as "errata" and summarily changing the opinion without giving the parties notice or an opportunity to be heard, the Second Circuit invoked an informal, summary procedure that should have only be used for clerical errors.[4] Using such errata to substantially revise the

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[3] Indeed, it is clear that the late notice did prejudice the insurance company. See Footnote 1.

[4] This Court has scrupulously limited its use of errata to correct opinions to obvious clerical errors. A review of some fifty United States Supreme Court cases from 1859 through 1988 in which the Court utilized errata corrections show that 41 times it was utilized for typographical errors; three times to add names of counsel to the appearance list; four citation errors; once to add a sentence in the factual background section; and once to clarify the description of the high water mark in a boundary dispute between two states. *Alabama v. Georgia*, 64 U.S. 505, 506 (1859). In none of the cases reviewed did this Court change, add, or modify any substantive law upon which it relied in support of its decision. Moreover, in each case the errata technique was used, the change was clearly identified.

Some 94 court of appeals cases utilizing errata sheets to modify their opinions were identified. In the non-Second Circuit cases, the changes are clearly delineated and essentially correct typographical errors. The exception is the Second Circuit. That Circuit's practice permits an opinion to be summarily altered after

opinion was an abuse of discretion.

While a court of appeals has "inherent judicial power" to identify and correct clerical errors, *Calderon v. Thompson*, 523 U.S. 538, 549, 567 (1998), this Court has ruled that the error-correction power is to be exercised "sparingly." Because of the "profound interests in repose attaching to the mandate of a court of appeals," this power can be exercised only in "extraordinary circumstances" and is subject to review for an abuse of discretion. 523 U.S., at 549, 567.

Accordingly, the Court of Appeals should limit the errata technique to remedy a "clerical error, a copying error or a computational mistake" in its judgment. It should not use an Errata Sheet to make substantive changes in its judgment. See *In re West Texas Marketing Corp. (United States v. Kellogg)*, 12 F.3d 497 (5th Cir. 1994).

C. Using Errata to Materially Change an Opinion Review Contradicts the Appellate Rules.

The plaintiff asserts the petitioner's second

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the period for seeking post-opinion review under Appellate Rule 35 or Rule 40 has expired. See, e.g., *Boria v Keane*, 99 F.3d 492 (2d Cir., May 3, 1996), 90 F.3d 36 (2d Cir., July 17, 1996), 83 F.3d 48 (2d Cir., May 3, 1996) (where the Second Circuit substituted a 'corrected opinion' long after the period to seek review had expired). Another example is *In re McKenna*, 238 F.3d 186 (2d Cir. 2001) (decided January 17, 2001, modified by an Errata Sheet, on April 16, 2001). (A subsequent report of the *McKenna* case, reported at 2001 WL 4577775, asserts that the errata sheet was followed by yet another modification on May 1, 2001.)

argument lacks "legal authority." Opposition Brief, at 12. The plaintiff is wrong, dead wrong. The legal basis for the defendant's argument is found in Rules 35 and 40 of the Federal Rules of Appellate Procedure.

The Federal Rules of Appellate Procedure provide the procedure for cases in the Courts of Appeals. These procedural rules are not mere guidelines; they are objective rules of law that regulate the conduct of federal judicial proceedings.

> When a situation is covered by the Federal Rules, ... the court has been instructed to apply the Federal Rule, and can refuse to do so only if ... the Rule ... transgresses ... the Enabling Act or constitutional restrictions.

Hanna v. Plumer, 380 U.S. 460, 471 (1965).

The Appellate Rules grant the losing party in the Court of Appeals the right to respond to the panel opinion in two ways: (1) the party can seek review under Appellate Rule 40 from the original panel; or (2) en banc review under Appellate Rule 35.

The panel's decision to bypass the procedures set forth in Appellate Rules 35 and 40 by issuing an Errata Sheet after the Petition to Rehear had been filed, had the effect of cutting off the defendant's rights under the Appellate Rules. Because the Rules grant a right to seek further review either before the original panel or en banc, the decision to cut off that right by using the Errata Sheet, not as a way to correct clerical errors, but as a judicial shortcut to bypass the normal

procedures of the Appellate Rules, should not be permitted.[5]

D. The Opinion Resulting from the Errata Sheet Will Result in Error and Confusion on Remand.

The result of this procedural morass will be confusion and controversy on the remand. For example, *Celotex v. Catrett* is quite clear that, in federal summary judgment motions, the burden of showing the existence of a genuine issue of material fact is on the party having burden of proof at trial. Despite this holding the original slip opinion held that "Public Service bore the burden of 'demonstrat[ing] the absence of any genuine factual dispute.'" App. 36a. while even though the law is quite clear that the burden is on the plaintiff, not the defendant, the slip opinion stated the issue on remand as "whether Public Service may on remand show prejudice." App. 40a. The ultimate decision did not correct these obvious errors as to who will have the burden on remand.

Instead of resolving confusion, the ultimate opinion merely garbled the issue of who has the burden on remand. Even though the *Celotex* case holds that the burden in a federal summary judgment motion is on the party with the burden of proof at trial, not on the

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[5] This Court has authority to "prescribe the method by which the lower courts go about deciding the cases before them." *Nguyen v. United States*, 123 S.Ct. 2130, 2138 n.13 (2003) ("The authority to review judgments of the courts of appeals undoubtedly vests us ... with authority to prescribe the method by which those courts go about deciding the cases before them.").

moving party, the ultimate opinion referred to the defendant's burden "as the moving party, . . . to demonstrate the absence of a genuine issue of material fact on the material prejudice issue." App. 17a. The court then confused the issue further by stating that it "express[ed] no opinion" on that issue. App. 17a.

In short, the Second Circuit's effort to create a shortcut by ignoring the procedural mandates of the Appellate Rules has resulted in a confused and misleading opinion. Instead of applying this Court's often stated *Celotex* rule, the opinion below rejects the principles of *Celotex*.

CONCLUSION

Either *Celotex Corp. v. Catrett* is the law or it is not. Although this Court has repeatedly reaffirmed and reiterated the holding of *Celotex*, the Second Circuit now refuses to apply that well known rule. Because the Second Circuit's ruling deviated from well-established precedent, the petitioner again prays that this court grant the writ of certiorari, vacate the decision below and remand for further proceedings consistent with *Celotex Corp. v. Catrett* (1986).

Respectfully submitted,

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